Cheng Siak Hor T/A United Penang Trading & Transport Agency & Anor v Rozali bin Ahmad

HIGH COURT (PULAU PINANG) — CIVIL APPEAL NO 12-353 OF 2000
KAMALANATHAN RATNAM J
5 JUNE 2002

Damages (Personal Injury or Death) — *Quantum* — *Serious injury* — *Paraplegia* — *Appeal against damages awarded*

The plaintiff, a motor mechanic, had jacked up a motor lorry that had broken down along a road. Whilst the plaintiff was beneath the lorry and in the midst of repairing it, the second defendant ('D2') mounted the lorry and started the lorry's engine. This caused the jack to fall off and the lorry landed on the plaintiff and caused him severe bodily injuries, including paraplegia. The first defendant ('D1') was the owner of the lorry and the employer of D2. The sessions court judge found both the defendants liable and awarded: (a) general damages of RM150,000; (b) future loss of earnings at RM750 per month for 16 years; (c) future nursing care at RM400 for 16 years; and (d) cost of diapers at RM15 per month for 16 years. The defendants appealed against the decision of the sessions court judge.

Held, dismissing the appeal on the issue of liability and the award of damages in respect of item (a):

(1) As for the award of damages for future loss of earnings in item (b), and RM120 should be deducted from the monthly salary, being SOCSO contribution and personal maintenance respectively. Therefore, loss of future earnings amounted to RM510 per month instead of RM750 as originally awarded by the sessions court judge. As for future nursing care in item (c), the same was reduced to RM200 per month whereas the award for cost of diapers in item (d) was reduced to RM10 per month from RM15 (see p 278E–G).

(2) The plaintiff was not D1's employee and the issue of the Employees' Social Security Act 1969 ('the Act') applying in this case did not arise. The plaintiff's right to sue the owner and driver of the said lorry arose from the provisions of the Road Transport Act 1987 and the said lorry was at the material time covered by a valid insurance. Section 31 of the Act, coupled with the repeal of s 42 clearly meant that the plaintiff was entitled to make his claim against the owner and driver of the said lorry (see pp 278D, 281B–C).

[Bahasa Malaysia summary

Plaintif, seorang mekanik motor, telah menaikkan sebuah lori yang telah rosak di jalanraya dengan menggunakan jek. Ketika plaintif berada di bawah lori tersebut dan ketika sedang membaikinya,

defendan kedua ('D2') telah menaiki lori tersebut dan memasang enjin lori tersebut. Ini telah menyebabkan jek tersebut jatuh dan lori tersebut menghempap plaintif dan menyebabkan kecederaan tubuh yang serius, termasuk paraplegia. Defendan pertama ('D1') merupakan tuan punya lori tersebut dan majikan D2. Hakim mahkamah sesyen memutuskan kedua-dua defendan bertanggungan dan mengawardkan: (a) ganti rugi am sebanyak RM150,000; (b) kehilangan pendapatan masa depan pada kadar RM750 sebulan selama 16 tahun; (c) penjagaan kejururawatan masa depan pada kadar RM400 selama 16 tahun; dan (d) kos lampin pada kadar RM15 sebulan selama 16 tahun. Defendan-defendan merayu terhadap keputusan hakim mahkamah sesyen tersebut.

Diputuskan, menolak rayuan atas isu tanggungan dan award ganti rugi berhubung dengan perkara (a):

(1) Bagi award ganti rugi untuk kehilangan pendapatan masa depan dalam perkara (b), RM17 dan RM120 haruslah ditolak daripada gaji bulanan, yang merupakan sumbangan PERKESO dan penyenggaraan peribadi masing-masingnya. Oleh itu, kehilangan pendapatan masa depan berjumlah sebanyak RM510 sebulan dan bukannya RM750 seperti mana yang diawardkan pada asalnya oleh hakim mahkamah sesyen. Berhubung dengan penjagaan kejururawatan masa depan dalam perkara (c), ianya telah dikurangkan kepada RM200 sebulan sedangkan award bagi kos lampin dalam perkara (d) telah dikurangkan kepada RM10 sebulan daripada jumlah sebanyak RM15 (lihat ms 278E–G).

(2) Plaintif bukannya pekerja D1 dan isu Akta Keselamatan Sosial Pekerja-Pekerja 1969 ('Akta tersebut') yang dipakai dalam kes ini tidak berbangkit. Hak plaintif untuk mendakwa tuan punya dan pemandu lori tersebut berbangkit daripada peruntukan-peruntukan Akta Pengangkutan Jalan 1987 dan lori tersebut adalah pada waktu yang material itu dilindungi oleh insuran yang sah. Seksyen 31 Akta tersebut, bersama-sama dengan pemansuhan s 42 dengan jelas bermaksud bahawa plaintif berhak untuk membuat tuntutan beliau terhadap tuan punya dan pemandu lori tersebut (lihat ms 278D, 281B–C).]

Notes

For cases on quantum for serious injury, see 7 *Mallal's Digest* (4th Ed, 1997 Reissue) paras 1325–1389.

Legislation referred to

Employees' Social Security Act 1969 ss 31, 42
Evidence Act 1950 s 114(g)
Road Transport Act 1987

Sanita Kaur Sandhu (*Jaggit Singh* with her) (*Ajmer, Sandhu & Ong*) for the appellant/defendant.

EP Seeralasittan (*Chong & Poh*) for the respondent/plaintiff.

Kamalanathan Ratnam J:

Facts

On 2 October 1997, the plaintiff, a motor mechanic, had jacked up motor lorry No PDH 7799 which had broken down along Jalan Pokok Macang Tasek Gelugor and was lying below the said lorry and repairing it. The plaintiff pleaded in his statement of claim that the said lorry belonged to the first defendant and was driven at all material times by the second defendant as the servant or agent of the first defendant. Whilst the plaintiff was beneath the lorry, the second defendant, having mounted the said lorry started the engine and put the vehicle in motion whereby the jack fell off and the lorry landed on the plaintiff causing him severe bodily injuries resulting in the plaintiff suffering paraplegia. He then sued both the defendants for pain and suffering, loss of actual and future earnings, future nursing care and costs.

The defendants' case

In their amended defence, the defendants denied that the accident had occurred as pleaded by the plaintiff. Alternatively, the defence was a plea of inevitable accident in that since the spring of the front left tyre had broken and whilst the foreman was repairing it, the defendant had started the engine and put the vehicle in motion. It must be specially noted that whilst the reference was to a foreman there was no specific reference to the plaintiff as being the foreman.

There was also a pleaded defence that since the plaintiff as contended by the defendants, was an employee of the defendants, he was caught by s 31 of the Employees' Social Security Act 1969.

Decision of the sessions court

The learned sessions court judge who heard the case at first instance found both the defendants totally liable and awarded damages as follows:

1)	General damages	RM	150,000
2)	Future loss of earnings at RM750 pm for 16 years.	RM	144,000
3)	Future Nursing Care at RM400 for 16 years	RM	76,800
4)	Cost of Diapers at RM15 per day for 16 years	RM	86,400
		RM	457,200

There was also an award of interest at 8% on general damages from date of service to date of judgment. A

As for special damages, the court awarded:

1) As costs of wheel chair, air bed and special toilet seat RM 22,200 B

The special damages attracted interest at 4% from date of accident to date of judgment.

The total interest amounted to RM21,961.80. There was also an award of costs.

The court rejected the plea of the applicability of the Employees' Social Security Act 1969 to this case. C

Findings of this court

Dissatisfied with the decision of the sessions court, the defendants appealed. Having heard full arguments, I upheld the decision of the sessions court on the issue of liability and found the defendants fully liable. I also held that the plaintiff was not an employee of the first defendant and that therefore the issue of the Employees' Social Security Act 1969 applying in this case, did not arise. D

On damages, I upheld the award of RM150,000 for fracture dislocation at T12 / L1 with complete paraplegia. E

As for loss of future earnings, I allowed the appeal. Whilst upholding the earnings of RM750 per month as his salary I deducted:

(i) RM17 as SOCSO contribution F

(ii) RM120 for personal maintenance.

I therefore rounded up loss of future earnings to RM510 per month. The future loss thus amounted to RM97,920 (RM510 × 16yrs × 12 months). I also allowed the appeal against future nursing care. I reduced the sum to RM200 per month. Costs of the future nursing care came to RM38,400 (RM200 × 16 × 12). I also reduced the award for diapers to RM57,600 (RM10 per day × 30 × 16 × 12). Since the defendant only succeeded in reducing the quantum and failed in his appeal against liability, I exercised my discretion and ordered that each party was to meet its own costs. G

Being dissatisfied with my findings only on the issue of the non-applicability of the Employees' Social Security Act 1969 to this case, the defendants have appealed. This is my judgment on that issue. H

Before I consider this issue, it is pertinent to review the evidence led by both parties. PW1, the investigating officer of the case, testified that an accident had occurred at Jalan Pokok Macang Tasik Gelugor between the plaintiff and the said lorry. Whilst the accident had occurred on 2 October 1997, he knew of this accident only on 8 October 1997 at about 5.45pm when the second defendant lodged a police report. In the said report, the I

second defendant had stated that as he was driving the said lorry along Jalan Pokok Macang Tasek Gelugor, the said lorry broke down. He telephoned his office and two foremen came to repair it. When the repairs were concluded he got into the lorry and started the engine and as his lorry moved he heard a shout from beneath his lorry. He found both the foremen beneath the said lorry. They dragged the injured plaintiff out and sent him to hospital. From his evidence, it was gathered that criminal proceedings were commenced against the driver of the said lorry. PW2, the foreman, testified that he was the plaintiff's employer. He produced a letter which he had signed which stated that the plaintiff had been employed by him as a mechanic since 1 June 1995 and that he had paid his dues including the EPF deductions. He testified that the plaintiff had not returned to work after the accident. He continued to pay the plaintiff his salary for only two more months after the accident. Under cross-examination he admitted that he too was underneath the lorry, working with the plaintiff when the accident occurred. He confirmed that the owner of the said lorry at the material time was the first defendant. His workshop was called Siak Hor Motor. He also confirmed that when the repairs were being done to the lorry, it was jacked up for about a foot. He was not beneath the lorry when the accident occurred. He was, at that time, beside the lorry whilst the plaintiff was beneath it. His police report which was tendered, confirmed the same story. The defendants produced a monthly statement from Siak Hor Motor showing their compulsory contribution to the Social Security Fund made pursuant to the Employees' Social Security Act 1969 in respect of their employees. In that statement, the plaintiff has been registered as an employee of the said Siak Hor Motor and a contribution on his behalf has been made by Siak Hor Motor towards the said Social Security Fund.

What is most significant in respect of the issue raised by the appellants in this appeal arose during the cross-examination of the plaintiff's employer by defence counsel. It was put to the witness by the defence that the accident did not occur along Jalan Pokok Macang Tasek Gelugor, but at his workshop. This was denied by the plaintiff's employer. The plaintiff himself testified and confirmed that the accident had indeed occurred at Jalan Pokok Machang Tasek Gelugor. His testimony was similar to that of his pleadings. He denied that the accident had occurred at the worksite.

For the purposes of considering the only issue under appeal, it is relevant to reproduce the relevant applicable sections in the Employees' Social Security Act 1969.

The pre-amended s 31 reads as follows:

> An insured person or his dependants shall not be entitled to receive or recover from the employer of the insured person, or from any other person who is the servant of the employer, any compensation or damages under any other law for the time being in force in respect of an employment injury sustained as an employee under this Act:

However, the Employees' Social Security (Amendment) Act 1997 which came into force on 27 January 1997 added the following proviso to the old s 31. The said proviso reads:

> Provided that the prohibition in this section shall not apply to any claim arising from motor vehicle accidents where the employer or the servant of the employer is required to be insured against Third Party Risks under Part IV of the Road Transport Act 1987 [Act 333].

It is also necessary to reproduce the old s 42 of the Act which reads as follows:

> When a person is entitled to any other benefits provided by this Act, he shall not be entitled to receive any similar benefit admissible under the provisions.

This s 42 was however repealed by A981.

In the statement of claim the plaintiff has pleaded as follows:

> 1 Pada setiap masa motolori berdaftaran No PDH 7799 adalah kepunyaan pihak defendan pertama.
>
> 2 Pada setiap masa pihak defendan kedua adalah pemandu motolori No PDH 7799 serta pengkhidmat atau ejen atau dengan keizinan pihak defendan pertama.

The amended defence reads as follows:

> 1 Defendan-defendan mengakui Kandungan perenggan 1 dan 2 Pernyataan Tuntutan.

It is clear therefore that the lorry in question PDH 7799 was owned by the first defendant, trading as United Penang Trading and Transport Agency. A search made at the Registry of Business and enclosed in the Appeal Record shows that the first defendant was the sole proprietor of United Penang Trading and Transport Agency and that both his residence and principal place of business was at 1448 Kampong Selamat, Tasek Gelugor, Seberang Perai, 13300 Pulau Pinang. The nature of his business was stated as general commission agent, transport and tour agent and trading in timber. These businesses had nothing to do with motor repairs.

From the earlier submissions made before the sessions court judge and which submission of the plaintiff was by consent put into the appeal record, I gathered that the lorry No PDH 7799 and registered in the name of the first defendant was insured with Pacific and Orient Insurance Co Bhd. Although the cover note was exhibited in an affidavit before the learned sessions court judge, neither the said cover note nor the affidavits were included in the appeal record before me. However, since there was no objection from the defendants/appellants to the inclusion of the submission and since the defendants themselves in their submission did not deny that lorry PDH 7799 was at the material time insured with Pacific and Orient Insurance Co Bhd, I hold that the said lorry was indeed at the material time insured with the Pacific and Orient Insurance Co Bhd.

A search was also made at the Registry of Business in respect of Siak Hor Motor. The search was enclosed in the appeal record. This showed that Siak Hor Motor was a partnership comprising of four persons having first commenced the only business of motor repairs, on 19 March 1991. Two of the four partners were Chong Siak Hor, the sole proprietor of the first defendant, and PW2, who testified as the plaintiff's employer.

A It is the case of the defendants that since Chong Siak Hor is also a partner of Siak Hor Motor which employed the plaintiff, the plaintiff is caught by s 31 of the Act. In 1997 the act was amended. It removed the draconian s 42 which precluded a person in the position of the plaintiff from an entitlement to recover any other compensation under any act once he is entitled to receive compensation pursuant to the Employees' Social B Security Act 1969. Parliament in its wisdom saw the need to repeal this section and in addition, it added on the illuminative proviso to s 31. Thus, this proviso specifically protected persons like the plaintiff in this case who sued the owner and driver of the said lorry PDH 7799. The rights of the plaintiff to sue the owner and driver of the said lorry arise from the C provisions of the Road Transport Act 1987. The said lorry was at the material time covered by a valid insurance. The insurers at the material time were Pacific and Orient Insurance Co Bhd. In the circumstances, it is my judgment that the proviso to s 31 of the Act coupled with the repeal of s 42 clearly meant that the plaintiff herein is entitled to make his claim against the owner and driver of the said motorlorry.

D The defendants made a futile effort to suggest in cross-examination that the accident occurred not at Jalan Pokok Macang Tasek Gelugor but at the workshop in an attempt to suggest that the plaintiff had sustained an 'employment injury' within the meaning of s 31 of the Employees' Social Security Act 1969. I agree with the findings of the learned sessions court E judge who rejected this suggestion. Firstly if this was indeed the case then it ought to have been pleaded. Such a serious matter that goes to the root of the defendants' case, when they contend that the injury was at the repair shop, was not even pleaded. To my mind such a suggestion in cross-examination without any foundation being laid by way of pleadings, is unacceptable. Then there is the police report of the driver. In this report, F the driver of the said lorry at the material time confirmed that the accident occurred at Jalan Pokok Macang Tasek Gelugor. As for the admission of the lorry driver's police report, the defendants contended that the said report was inadmissable. The defendants did not call the lorry driver to testify. However, even before the plaintiff closed his case he attempted to call the driver and this was objected to by the defence. It must be known that there G is no proprietory right over a witness. Even a defendant is liable to be called as the plaintiff's witness subject, of course, to the risk of the defendant giving unfavourable evidence. Clearly, the sessions court had erred in rejecting the plaintiff's request to allow the defendant driver to be called as a witness. As soon as the report was rejected by the court, the plaintiff closed his case. The defendants then proceeded to submit, no case to answer. In H the circumstances, clearly the plaintiff was entitled to invoke the presumptive s 114(g) of the Evidence Act 1950 against the defendants and to hold that the accident did indeed occur on the road as stated by the lorry driver in his police report and not at the worksite as was suggested in cross-examination.

I Since the negligent act of the driver had caused the accident and since there is no appeal against this finding, the owner of the lorry becomes vicariously liable to the driver and the insurers Pacific and Orient Insurance

Co Bhd become liable by virtue of the provisions of the Road Transport Act 1987. There is no place for the Employees' Social Security Act 1969 in this case as the plaintiff is not an employee of the first defendant.

Appeal on the issue of liability and the award of damages in respect of item (a) dismissed.

Reported by Lim Lee Na